

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Chapter VIII, Rule 32(2) (b)
Description of case

Case No. A.O. No. 1456 of 2001

Smt. Shakuntala Devi & others	-----	Appellant
	<u>Vs.</u>	
Ajit Singh & others	-----	Respondents.
		Date of decision: 24.8.04

For the approval of:

Hon'ble Mr. Justice P.C. Verma.

Hon'ble Mr. Justice B.S. Verma.

- Whether the order/judgment should be sent to the reporters for reporting? (Yes.)
- Whether the reporters be allowed to see the judgment? (Yes.)

COURT NO. 2.

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL.

Appeal from Order No. 1456 of 2001

Smt. Shakuntala Devi
& others

... **Appellants.**

Versus

Ajit Singh and others

... **Respondents.**

Mr. S.N.Babulkar, learned Senior Advocate, for the appellants.
Mr. V.K.Kohali, learned Senior Advocate, for the respondent.

Coram : Hon'ble P.C. Verma, J.
Hon'ble B.S. Verma, J.

This appeal has been preferred under Section 173 of the Motor Vehicles Act, 1988, **(in short the Act)** against the judgment and Award dated 7-6-2001 passed in Motor Accident Claim Case No. 164 of 1997 by the Motor Accident Claims Tribunal/Additional District Judge, IV F.T.C., Dehradun, **(in short the Tribunal)**, whereby the learned Tribunal has allowed the claim petition and awarded Rs. 9,89,960/- in favor of the claimants/appellants as against Opposite Party Nos. 1 and 2/Respondent Nos. 1 and 2 along with 9% interest per annum. However, the petition purports to have been dismissed against the New India Insurance Company, O.P.No.3 (respondent no.3).

Subsequently, a review petition was filed before the learned Tribunal by O.P.-respondent no. 1 Ajit Singh for review of the impugned judgment and award, dated 7.6.2001 on the ground certain mistakes regarding fact of the case have crept in the judgment and award. Ultimately, the learned Tribunal has modified its order to the extent that O.P.No.1 Ajit Singh Basu is absolved from the liability of payment of compensation awarded. Aggrieved, the claimant-appellants have come up in appeal before this Court to set aside the impugned judgment and award mainly on

the ground that the findings of the Tribunal exonerating the Insurance Company and fastening the liability on the driver alone, who is a minor is perverse. It has also been contended that the amount of award cannot be satisfied from the driver who has been absconding and that the findings of the Tribunal are not based on settled principles of law and not based on evidence.

Brief facts, giving rise to the present appeal, are that the claimant-appellants preferred a claim petition for compensation for the death of Shiv Prasad Benjuwal, **(the deceased)**, who died as a result of injuries sustained by him in a motor accident occurred on 3.9.97 at 1.30 p.m. with the allegations that on the fateful day, the deceased was coming from his office situate near Subhash Road Crossing within P.S. Dalanwala to his house for lunch. In the meantime, at the said crossing, one Yamaha Motor Cycle No. U.P. 07-B/0880, which was being driven rashly and negligently by its driver hit Shiv Prasad, with the result he sustained grievous injuries and died. The offending vehicle was insured with New India Insurance Company. Report of the accident was lodged with the police. The deceased was aged 52 years and was getting Rs. 11,170/- per month as his salary. Hence the claim petition by his legal heirs-claimants.

The O.P.No.1, Ajit Singh, filed his written statement and denied all the allegations of the claim petition. It has been asserted that the petition is baseless and false. The answering O.P. was not driving the offending vehicle, nor any driver was employed to drive the same. O.P. No.2 is not an employee of the answering O.P. It has been asserted that the O.P.No.2 took the motor bike from the college premises without his permission. The O.P. informed about the incident to the college Principal and also told to his father. Then Principal of Ideal College called the O.P. No.1 and his father on 3.9.97 and asked them that the motor bike is lying at the police station and they can collect it. When the O.P. No.1 accompanied by his father went to the police station concerned,

then he came to know about the alleged accident resulting into death of the deceased. It has also been asserted that the O.P. No.2 alone is responsible for the accident. It has further been pleaded that the motor bike was insured with the Insurance Company.

Opposite Party-respondent no.2 also filed his written statement and denied the allegations made in the petition. It has been pleaded that neither he is the owner of the offending vehicle, nor he was driving the same. He has even no driving licence, therefore, the answering O.P. is not liable for compensation.

O.P.No.3-Insurance Company has contested the petition by filing its written statement on the ground inter alia that the O.P.No.1 was the owner of the vehicle involved in the accident and the vehicle was insured with the company. It has been asserted that the driver who was driving the motor cycle at the time of accident was not holding any driving licence, therefore, there being breach of the policy conditions, the Insurance Company is not liable to pay compensation.

On the pleadings of the parties, the Tribunal has framed as many as six Issues. **Issue No.1** related to accident in question resulting into injuries and death of the deceased. **Issue No.2** related to rash and negligent driving by the Opposite Party No.2 of the motor cycle involved in the accident and holding of valid driving licence by him. **Issue No. 3** related to insurance of the vehicle with the Insurance Company. **Issue No. 4** related to driving of motor cycle in question by O.P.No.2 with the permission of O.P.No.1. **Issue Nos. 5 and 6** related to compensation and relief.

The claimant-appellants filed documentary evidence as well as produced two witness, Km. Swarnlata, P.W. 1 and Ummed Singh, P.W.2. On the other hand, the opposite-party-respondent No. 1 has filed one paper, while O.P.-Insurance Company has filed

Insurance Policy. O.P. No.2 Shiv Prasad Gurung has filed his own affidavit and documents. From the side of the opposite parties, O.P.No.1 has examined himself as D.W.1, while O.P. No. 2 has examined himself in the witness box as D.W.2 in support of their contentions.

Learned Tribunal after considering the evidence on record, has taken up Issue Nos. 1 and 2 together. It has been found by the Tribunal that O.P. No.2 Shiv Prasad Gurung was driving the motor cycle at the time of accident without having a driving licence. It has also been held that the accident in question was the result of rash and negligent driving of the said vehicle by O.P.No.2. The Tribunal took Issue Nos. 3 and 4 together and ultimately, the Tribunal had held that the motor cycle was being driven at the time of accident by O.P. No.2 with the permission of O.P.No.1, though O.P.No.2 did not possess driving licence at all and he was minor at the relevant time. It has been held that the Insurance Company was not liable for compensation. On Issue No.5, the learned Tribunal has ultimately held that the claimants are entitled to the sum of Rs. 9,89,960/- as compensation and has accordingly passed the impugned judgment and award. However, no finding appears to have been recorded on Issue No.6, though it also related to the relief. Subsequently, O.P.No.1 Ajit Singh Basu Preferred a review petition before the learned Tribunal, which was registered as M.A.C.T. Misc. Case No. 17 of 2001 on the legal point that in this case, the Tribunal had fallen in error in fastening liability to pay compensation on the owner, O.P.No.1, whereas in the cases where it is found that the offending vehicle was used without the permission of the owner, only driver of the vehicle is responsible to pay the compensation. After hearing both the parties and taking support from various case laws referred to in the judgment and order dated 23.8.2001, the learned Tribunal modified its earlier order/award dated 7.6.2001 thereby absolving the O.P.No.1 Ajit Singh Basu to pay compensation.

We have heard learned counsel for the claimant-appellant, Sri S.N. Babulkar, at length as well as learned counsel for the respondent, Sri V.K. Kohali, and have carefully gone through the entire material available on record including the impugned judgment and award dated 7.6.2001 as well as order dated 23.8.2001 passed on the review petition.

It has been vehemently submitted on behalf of the appellants that the finding of the Tribunal on Issue Nos. 3 and 4 are self-contradictory inasmuch as the Tribunal has observed in page no. 7 of its main judgment that it is proved on record that at the time of accident, Shiv Prasad Gurung was driving the motor cycle is question. In the very next line, it has been observed by the Tribunal that so far as question of permission is concerned, the O.P.No.1 Ajit Singh has not produced any evidence to indicate as to whether he gave permission or not; but it is not possible to drive the motor cycle without key. Our attention has also been drawn to the technical report, paper no. 56-C/5 on record, which shows that on 18.9.1997 the alleged motor bike was inspected and it was found in working order and there was no indication of breaking open of the lock. We have also been referred to the conclusions arrived at by the Tribunal to the effect that the owner was also negligent in leaving the motor cycle with its key inserted on the lock. It has further been argued that even if it may be presumed that the driver was not holding a valid driving licence, even then it is settled law that in case of breach of conditions of policy contract, the Insurance Company cannot be absolved from its liability to pay compensation. We have been referred to the verdict of the Apex Court recorded on paragraph no. 110 (iii) & (iv) of the judgment in the Case of ***“National Insurance Company Limited Vs. Swaran Singh” [2004(3), Supreme Court Cases, 297]***, therefore, it has been submitted that the impugned judgment and award, i.e. judgment and order dated 23.8.2001, is liable to be set aside.

Having considered the contentions of the claimant-appellant from all aspect of the case, we are inclined to hold that it is a case fir for remand, **firstly**, because from the written statement paper no. 39-B filed by the O.P. Ajit Singh, it is no where mentioned by the owner himself that his motor cycle was stolen by anyone. No plea has been taken by the owner that due to oversight, he had left his motor cycle with its key hanging on the motor bike. This Ajit Singh Basu could not dare say in his written statement that he had ever lodged a report with the police regarding his vehicle having been stolen, though he got the information about his motor cycle lying at the police station on the same day. It is a very strong circumstance, which goes against the case, as set up by the O.P.-respondent no.1, **secondly**, because the learned Tribunal in the middle of page of its main judgment has observed that the correct facts have been willfully concealed by the O.P.No.1,so as to absolve himself from the liability of making payment on compensation and shift the same on the Opposite Party Nos. 2 and O.P. No.3 **Thirdly**, because the O.P.-respondent no.1 could not muster courage enough to produce the Principal of the Ideal College in the witness box, who could be the best witness to depose regarding theft and otherwise of the motor bike in question, especially when the said O.P. No.1 has produced paper no.67, allegedly issued by the Principal of the college, in support of his contention as raised in the written statement; **fourthly**, once the learned Tribunal has arrived at a conclusion that the O.P. Ajit Singh Basu has concealed correct facts before the Tribunal in order to exonerate himself, from the responsibility of compensation, it does not stand to reason as to how the Tribunal had arrived at a different conclusion at review stage in holding that in the present case, the vehicle involved in the accident, i.e. Motor Bike No. U.P. 07 B./0880 was stolen and used by the O.P. No.2 in such a manner, which ultimately resulted into the motor accident in question; **fifthly**, because the O.P. No.1 Ajit Singh Basu has never tried to lodge a report regarding theft of his motor-bike, though, according to his own written statement, he had received information from the

Principal of the college that his motor bike had been lying at the Police Station on the fateful. Had it been a case of stolen property, there was no reason why the owner of the vehicle would not lodge a report with the police at the first opportunity; **sixthly**, that the learned Tribunal had lost sight of its own observations while dealing with review petition, that a concrete finding had already been arrived at by the Tribunal that in the present case, the vehicle was neither stolen, nor the key of the vehicle was lost and above all, the lock of the vehicle was found intact at the time of inspection and **seventhly**, the learned Tribunal had gone far away from the case taken up in the written statement (39-B) by the O.P. Ajit Singh Basu, while allowing the review petition, which in our opinion goes against the findings recorded on Issue Nos. 3 and 4. The theory of the motor bike having been stolen or taken away without the authority and knowledge of the owner is totally an after-thought plea taken for the purposes of the case alone. **Lastly**, the Apex Court in Summary of Findings recorded in paragraph No. 110 (iii) and (iv) of the judgment in the case of Swaran Singh (supra) has laid down the law regarding breach of policy condition, e.g., disqualification of driver or invalid driving licence of the driver and has held in sub-para (iii) that ***“to avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.”*** Further, sub-para (iv) it has been observed that ***“The insurance companies are, however, with a view to avoid their liability must not only establish the available defence(s) raised in the said proceedings but must also establish ‘breach’ on the part of the owner of the vehicle; the burden of proof wherefor would be on them.”*** It has further been observed in (v) that **the court cannot lay down any criteria as to how said burden would be discharged, inasmuch as the same would depend upon the facts and circumstances of each case.**

Besides above, the learned Tribunal has placed reliance on the pronouncement of the Madras High Court referred to by the Tribunal in its impugned judgment relating to a case where vehicle is taken without the permission of the owner; but in the present case, it is not at all the case of the owner O.P.No.1 that his motor bike was taken by the O.P.No.2 without his consent or permission.

It finds place to mention here that the scope of review is very limited under the provisions of Order XL VII of the C.P.C. The law provides that review of judgments may be allowed on three grounds, namely, *(i) discovery of new an important matter of evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or order was made, or (ii) some mistake or error apparent on the face of the record, or (iii) for any other sufficient reason (which has been interpreted to be analogous to the other reasons specified above)*. In this case, in our opinion, the Tribunal has re-appreciated the evidence, which was not at all within the scope of review, therefore, the Tribunal has exceeded its jurisdiction on this count. Again, the Tribunal has made a reference to a case-law showing that Tribunal has a right to review its award. But as discussed above, the present was neither related to taking of vehicle without permission, nor it was a case of stolen vehicle, therefore, the case law cited in the impugned judgment and award is not applicable.

For the reasons, stated above, we are of the opinion that the findings arrived at by the learned Tribunal in the Review Petition No. 17 of 2001, Ajit Singh Basu Vs. New India Assurance Company and others, are not based on proper appraisal of evidence on record and, accordingly, we have no option but to remand the case to the learned Tribunal for decision afresh, after affording opportunity of hearing to both the parties, and to set aside the judgment and order dated 23.8.2001 arising out of the main

M.A.C.T. Case No. 164 of 1997. The learned Tribunal shall be at liberty to record its findings afresh on all or either of the Issues already framed in the case in accordance with law, as may be deemed proper for just decision of the case.

In the result, the appeal succeeds.

The appeal is allowed. The impugned judgment and awards, dated 7-6-2001 and 23.8.2001 appealed against are set aside and the M.A.C.T. Case No. 164 of 1997, Smt. Shakuntala devi and others Vs. Ajit Singh Basu and two others, is remanded to the Motor Accident Tribunal concerned for decision afresh at an early date in the light of the observations made hereinbefore and in accordance with law. No order as to costs.

24-08-2004
RCP

(B.S. Verma, J.)

(P.C. Verma, J.)